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Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

No.————

COSKUN R. ATESER and BEVERLY ATESER, his wife,
Petitioners,

vs.

PUBLIC HOSPITAL DISTRICT NUMBER ONE d/b/a VALLEY GENERAL HOSPITAL, CHARLES P. CURRAN, E. R. COLEMAN
Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth District

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QUESTION PRESENTED

Whether it is a deprivation of procedural due process where it is shown that after a prior hearing, which resulted in restrictions on his privileges to practice medicine in the public hospital, petitioner was thereafter charged with violating said restrictions and his total hospital privileges were, as a result, summarily suspended (no hearing being allowed to review this action in violation of the bylaws of the hospital).

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth District entered in this proceeding on May 1, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on May 1, 1980. The subsequent order denying a rehearing was issued June 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether it is a deprivation of procedural due process where it is shown that after a prior hearing, which resulted in restrictions on his privileges to practice medicine in the public hospital, petitioner was thereafter charged with violating said restrictions and his total hospital privileges were, as a result, summarily suspended (no hearing being allowed to review this action in violation of the bylaws of the hospital).

CONSTITUTIONAL PROVISION STATUTE AND REGULATION

Fourteenth Amendment, U.S. Constitution

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 Civil Section for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulations, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Subsection 17, Section 5, Article III, Bylaws, Rules and Regulations of the Medical Staff, Valley General Hospital

If it shall become apparent to the Executive Committee that a staff member may have acted in breach of the Staff's Bylaws, Rules and Regulations, and that an emergency exists requiring immediate action, the Executive Committee shall be empowered to temporarily revoke or reduce a staff member's privileges provided the Committee shall immediately advise the Board of Commissioners in writing of the action taken and the reasons therefor. Further, upon taking such action the Executive Committee shall request the Credentials Committee to conduct an investigation of the matter, and the Credentials Committee shall thereafter, as soon as possible, report to the Executive Committee with their recommendation. A copy of said report and recommendation shall be sent to the physician or dentist involved, either by registered or certified mail. If the physician or dentist involved takes exception to the recommendation of the Credentials Committee, then he shall be entitled to a review of the matter and hearings pursuant to the terms, conditions and procedure set forth in foregoing Subsections 3 through 16 of this Section.

STATEMENT OF THE CASE

This is a lawsuit by a foreign-born doctor who was deprived of procedural due process when he was summarily suspended from his public hospital without being afforded a hearing or any other opportunity to be heard.

The respondents reviewed petitioner's medical ability and convened the Hospital Judicial Committee to review petitioner's actions. The Committee subsequently recommended that petitioner no longer have obstetrical privileges and that his general medicine privileges be continued only on the condition that he obtain consultation on any patient admitted by him to the hospital for more than 24 hours. After obtaining the medical staff concurrence, these recommendations were adopted by the Board of Commissioners. The recommendations became effective and were conveyed to petitioner on October 20, 1972. On October 31, 1972, and November 17, 1972, petitioner received letters from the Chief of Staff (Dr. Bardarson) informing petitioner that he had allegedly violated the foresaid restrictions. Then, on November 30, 1972, petitioner again received a letter from the Chief of Staff incorporating a third alleged violation of the restrictions and informing him that, because of his "flagrant" violations, the Executive Committee had declared an emergency to exist and that his admitting privileges were revoked.

The matter was then referred to the Credentials Committee who purportedly held a special meeting and reviewed the three letters from the Chief of Staff to petitioner. This Committee then concurred with the Executive Committee. These recommendations

were adopted by the Board of Commissioners on December 21, 1972.

Subsection 17, Section 5, Article III, Bylaws, Rules and Regulations, of the hospital provides that a copy of the report of the Credentials Committee be furnished to petitioner. No such procedure was ever followed nor was petitioner allowed to appear at the meeting of the Executive Committee or the credentials Committee where his fate was ultimately determined.

The Federal District Court for the Western District of Washington subsequently heard the matter per 28 U.S.C. §1343. Both the federal statute and the U.S. Constitution raised a federal question.

REASONS FOR GRANTING THE WRIT

The approval by the Court below of the respondents' summary dismissal of the petitioner from his hospital makes a travesty of the plain meaning of 42 U.S.C. §1983. The suspension of Dr. Ateser without affording him any opportunity to be heard and the refusal of the Hospital Judicial Committee to allow petitioner to submit information vital to his interests prior to terminating his hospital privileges is clearly a deprivation of his §1983 protected rights and did not afford him procedural due process. As more particularly set out in the statement of the case, after the restrictions of October 20, 1972 were imposed, petitioner was alleged to have "flagrantly" violated the same on at least three occasions. Further, as a result of these violations, petitioner ultimately had his entire hospital privileges revoked.

Initially, the question becomes whether peti-

tioner was afforded the minimum of procedural due process that is required by the United States Constitution. While the concept of due process does not necessarily require a trial-type hearing in every conceivable case of government impairment of a private interest, *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, it does require at least an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights of the party involved. *Link v. Wabash R. Co.*, 370 U.S. 626.

The Constitution does not prevent a Hospital from establishing standards for admission to or retention of hospital privileges but, where it is acting as a subdivision of the State (as in this case), it is required to meet the provisions of the Fourteenth Amendment in dealing with physicians admitted. *Meredith v. Allen County War Memorial Hospital Comm.*, 397 F.2d 33 (6th Circ. 1968).

It is submitted that in this case petitioner was entitled to notice and an opportunity to be heard before an impartial tribunal. The court is referred to a strikingly similar set of circumstances that were considered in *Woodbury v. McKinnon*, 447 F.2d 839 (5th Circ. 1971). That case recognizes the necessity of procedural due process where a physician's hospital privileges are to be curtailed. In that particular instance, the Court held that where the doctor involved was given a hearing with an opportunity to present his side, and had been fairly apprised of the nature of the charges against him, procedural due process was met.

Petitioner has been denied all the foregoing procedural prerequisites. First, the only correspon-

dence he received indicated there were alleged violations of his restricted privileges. Then, on November 30, 1972, he was informed by a third letter that an emergency had been declared and his privileges were suspended. No opportunity for him to appear, let alone explain the facts and circumstances justifying his actions; it was just a summary revocation. The letter of November 30, 1972, did not even indicate that it was a temporary revocation, only that his privileges had been revoked.

Pursuant to Subsection 17, Section 5, Article III of the Bylaws, Rules and Regulations of the Medical Staff, the matter was then transferred to the Credentials Committee for investigation and their report. The report of the Credentials Committee does not indicate that any investigation was done; rather, in reliance upon the three alleged violations, this Committee recommended permanent suspension.

Finally, the above-cited bylaw section requires a copy of the Credentials Committee report be sent to the physician involved. This was not done. Respondents contend that compliance with this "procedural nicety" was not necessary under the circumstances. It is submitted that this attitude is precisely the issue, and that, in fact, no "procedural niceties" were allowed to petitioner from the date of the November 30, 1972 letter through the affirmance by the Board of Commissioners on December 21, 1972. Surely procedural due process requires more than this!

The failure of the respondent hospital's Credentials Committee to investigate the veracity of the

allegations presented against the petitioner as required by their bylaws *plus* the failure to send a copy of the Credentials Committee report to the petitioner as required by their bylaws is not only a violation of procedural due process but is, in addition, a violation of the precept set forth in *Arizona Grocery Co. v. Atchison, Topeka, and Santa Fe Ry.*, 284 U.S. 370 (1932), that an administrative agency must follow its own rules. As the opinion of the Court below shows, there is no issue as to the foregoing facts.

The Circuit Court of Appeals denied petitioner's claim on the grounds that either previous procedural safeguards provided by respondents had been sufficient, that any procedural omission was offset by petitioner's alleged failure to exercise his procedural rights, and that petitioner's subsequent admission of the facts, which supposedly would have been the subject of any additional review, made any additional hearing unnecessary.

The preliminary proceedings regarding the conduct of Dr. Ateser are not at issue here. However, the subsequent denial of procedural due process is related to a completely different set of facts and circumstances. Petitioner simply wants a chance to explain the facts surrounding the incidents for which respondents summarily revoked his medical privileges.

Lastly, the Court of Appeals placed a great deal of emphasis on what the Court perceived as petitioner's subsequent admission of the very facts which would have been the subject of an additional review. The court cites *Black Coalition v. Portland*

School Dist. No. 1, 484 F.2d 1040 (9th Circ. 1973) as authority for the proposition that such an admission would preclude a subsequent cause of action for deprivation of procedural due process. The *Black Coalition* case deals primarily with a defective procedural review process. There is no such claim in the case at bar. To the contrary, Dr. Ateser simply wants a chance to avail himself to the existing review procedures. The "admission" made by petitioner was that he had admitted patients to the hospital without consultation. However, such an "admission" does not substantiate and support respondent's subsequent decision to suspend since there may have been good and valid reasons for Dr. Ateser's actions. Rather , the very purpose of a hearing should be to explain the facts and circumstances under which this was done. For instance, was it a routine or emergency admission of patients? Did he attempt to consult with another physician but found him unavailable? These are questions which could only be answered at a hearing. The Court of Appeals, therefore, cannot assume that the mere "admission" by the petitioner renders the procedural deprivation moot. There has been a deprivation of the Fourteenth Amendment and the implementing statute, 42 U.S.C. 1983.

For all the foregoing reasons, petitioner respectfully requests this Court to grant the writ for certiorari.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COSKUN R. ATESER, et ux., *Plaintiffs-Appellants,* vs. PUBLIC HOSPITAL DISTRICT NUMBER ONE, etc., et al., *Defendants-Appellees.*	No. 77-3568 ORDER

Before: TANG, SCHROEDER and POOLE, *Circuit Judges*

Appellants' petition for rehearing is denied.

[Filed June 6, 1980.]

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COSKUN R. ATESER, et ux., *Plaintiffs-Appellants,* vs. PUBLIC HOSPITAL DISTRICT NUMBER ONE, etc, et al., *Defendants-Appellees.*	No. 77-3568 MEMORANDUM

On Appeal from the United States District Court for the Western District of Washington

Before: TANG, SCHOEDER and POOLE*, *Circuit Judges*

Appellants, a physician and his wife, appeal from the summary judgment granted defendants in a civil rights action, brought under 42 U.S.C. § 1983, in which the physician alleged that his hospital staff privileges had been unconstitutionally revoked as a result of the conspiracy on the part of the governing board and staff of Valley General Hospital (the hospital). The hospital is organized as a public hospital district for King County, Washington, whose operations involve state action.

Dr. Ateser's professional performance was the subject of considerable peer concern and criticism.

*Honorable Cecil F. Poole was a United States District Judge for the Northern District of California, sitting by designation, at the time this matter was argued.

A judicial review committee of the hospital found cause to apprehend that his errors in judgment and procedure created unreasonable risks to patients. After almost two years of investigations, reviews and hearings by the institution's committees, the hospital's governing board revoked his obstetrics privileges and conditioned his continued general medicine admitting privileges upon his obtaining consultation from other staff physicians within 24 hours after he admitted any patient to the hospital. The doctor does not challenge the validity of these disciplinary actions which were attended by formalities exceeding the requirements of due process. See *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 367-69 (9th Cir. 1976)

Despite these restrictions, on two separate occasions Dr. Ateser caused patients to be admitted to the hospital without obtaining the required consultations from fellow physicians. Each incident brought further warnings that such admissions violated the conditions under which his staff admitting privileges were being kept open. When a third such uncounseled admission occurred within a few days, the Executive Committee reacted by invoking emergency provisions of the bylaws and revoking altogether Dr. Ateser's general medicine privileges. The letter notifying the doctor of this action referred him to the bylaw provision authorizing such emergency action. That provision entitles the physician to obtain reviews and hearings pursuant to other bylaw provisions. Dr. Ateser did not seek to invoke these procedures or request a hearing before the Board of Commissioners, but instead filed a state court action. Following action by the Credentials

Committee, the Board took final action revoking all of Dr. Ateser's staff privileges on the basis of his refusal to abide by the Board's previous directive.

When all of the proceedings are viewed in their entirety, it is clear that the hospital officials afforded Dr. Ateser procedural safeguards that were fundamentally fair and even generous under the circumstances. Given the numerous proceedings and elaborate safeguards that preceded the Board's initial action restricting his privileges, the failure to conduct still another hearing or set of committee reviews on the narrow issue of his violation of the restrictions did not amount to a denial of procedural due process. Any *technical* omission in this regard was more than offset by Dr. Ateser's own failure to exercise any remaining procedural rights, and his subsequent admission of the very facts which would have been the subject of any additional formal review. See *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973). The record supports a strong interest by the hospital in protecting its patients and the lack of a substantial risk of an erroneous decision resulting from the agency's actions. See *Mathews v. Eldridge*, 424 U.S. 19, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976); *Stretten v. Wadsworth Veterans Hospital, supra; Ong v. Tovey*, 552 F.2d 305, 307 (9th Cir. 1977). Dr. Ateser was not otherwise prejudiced by the failure to send him a copy of the Credentials Committee report, as required by the hospital's emergency rule. His due process rights were thus not violated.

Since no constitutional violation occurred, the conspiracy allegations added nothing to the sub-

stantive § 1983 claim. See *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 576 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). Appellants' contention that disputed issues of material fact concerning these allegations precluded summary judgment is therefore without merit.

AFFIRMED.

[Filed May 1, 1980.§

APPENDIX III

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

COSKUN R. ATESER, and BEVERLY ATESER, his wife, *Plaintiffs,* vs. PUBLIC HOSPITAL DISTRICT No. 1, et al, *Defendants.*	No. C74-74S SUMMARY JUDGMENT OF DISMISSAL

THIS MATTER having come on for oral argument before the undersigned judge of the above-entitled court on August 5, 1975, the defendants, JOHNNY W. TURNER, THOMAS E. MAXWELL, SAN LWAI, DOUGLAS R. CURRIN, PAUL M. TUEFFERS, KENNETH G. KAY and NICHOLAS NELSON having theretofore entered motion for summary judgment of dismissal of the plaintiffs' complaint herein, the parties being present in court or represented by their respective counsel of record, the court having considered the affidavits filed by the several defendants of said motion, the memoranda of authorities filed by the defendants and by plaintiffs in opposition to the said motion, the court having heard and considered argument of counsel and having determined that there is no genuine issue of material fact as to the asserted liability of the moving defendants and the court being fully advised in the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED that the defendants' motion for summary judgment of dismis-

sal be and the same is hereby granted, dismissing with prejudice the plaintiffs' complaint as to the defendants, JOHHNY W. TURNER, THOMAS E. MAXWELL, SAN LWAI, DOUGLAS R. CURRIN, PAUL M. TUEFFERS, KENNETH G. KAY and NICHOLAS NELSON.

DATED this 8th day of September, 1975.

/s/ DONALD S. VOORHEES
United States District Court Judge

PRESENTED BY:
/s/ FRANK W. DRAPER
Detels, Draper & Marinkovich
Attorneys for Defendants

APPROVED AS TO FORM AND NOTICE OF PRESENTATION WAIVED:

/s/ HERBERT H. FULLER
Fuller & Fuller,
Attorneys for Plaintiffs

/s/ THOMAS V. HARRIS
Merrick, Hofstedt & Lindsey,
Attorneys for defendant, Nicholas Nelson

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CHARLES P. CURRAN, E. R. COLEMAN,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ABCD AT CRAFTSMAN PRESS, SEATTLE

QUESTION PRESENTED

Whether it is a deprivation of procedural due process for the governing board of the respondent Hospital, pursuant to emergency provisions contained in Hospital by-laws, to revoke petitioner's staff privileges without a full hearing, where petitioner has admitted on the record and it is shown that on three separate occasions petitioner willfully violated restrictions which had been placed on his staff privileges by the Hospital's governing board as a result of prior hearings and investigations at which full procedural due process safeguards were present.

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No. 80-364

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COSKUN R. ATESER
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CHARLES P. CURRAN, E. R. COLEMAN,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Dr. Coskun R. Ateser was appointed to the medical Staff of Valley General Hospital in September, 1967, as an associate staff member. His status as an associate staff member was maintained until revocation of his privileges by the Board on December 21, 1972 (R. 150).

By 1970, Dr. Ateser's performance was a cause of increasing concern. In September of that year, Dr. Ateser failed to attend an Ob-Gyn Committee meeting regarding the severe complications from one of his infant circumcisions. In view of the reports of the nurses and physicians involved, the Committee requested the Executive Committee of the Medical Staff that Dr. Ateser not be permitted to do circumcisions until further notice (R. 190-191).

In December of 1970, Dr. Ateser's charts were reviewed by the Credentials Committee of the Medical Staff. Based on this review, the Credentials Committee recommended that his staff privileges be suspended. The bases for this recommendation were that a survey of his clinical competence was found to be inconsistent with the quality of medicine that the staff provides to the public, and that he failed

to attend the special committee meeting called for the purpose of evaluating the problem. By letter of January 7, 1971, Dr. Ateser was notified of the Credential's Committee's findings and recommendation (R. 203, 251).

Dr. Ateser quickly replied through an attorney and demanded the appointment of a special committee to review the matter, and further demanded that he be allowed to appoint at least one member of the committee (R. 204-205, 252).

By letter dated January 22, 1971, to Dr. Ateser's attorney the then Chief of Staff, Dr. Fred W. Reebs, advised that a review committee would be appointed and, although Dr. Ateser had no right to demand to choose a member, the name of a person who Dr. Ateser felt confidence in was solicited (R. 207, 252). On that same day, the Medical Staff was advised that the

Board of Commissioners deferred the reappointment of Dr. Ateser pending termination of his appeal from the joint recommendation of the Medical Staff's Credentials and Executive Committees that he be suspended. The Medical Staff was further advised that Dr. Ateser's privileges were not suspended pending termination of his appeal (R. 206, 252).

On January 26, 1971, Dr. Ateser was advised by Dr. Reebs that, pursuant to the By-Laws, a special review committee had been appointed whose membership consisted of Drs. J. W. Turner, Edward C. Calta, and John W. Vukov (R. 208, 252). A similar letter of February 9, 1971, to Dr. Ateser's attorney reveals that Dr. Vukov was selected at Dr. Ateser's instance (R. 229, 252).

The Special Review Committee was advised by the Chief of Staff that its purpose was to review in excess of sixty Hospital charts of patients admitted by Dr.

Ateser and to make findings respecting the quality and care provided by him, and to provide the Executive Committee with recommendations. The Committee did meet and did review all such charts. It was their opinion that the review of the charts disclosed a definite pattern of inadequate patient care.

Eleven charts which were felt to present the most flagrant examples of inadequate patient care were selected by the Special Committee for the purpose of discussing each of the charts personally with Dr. Ateser. Dr. Ateser was personally contacted about appearing on two different occasions to discuss the charts. On each occasion, he failed to show. Finally, Dr. Vukov, who had been appointed to the Committee at the specific request of Dr. Ateser, then called Dr. Ateser demanding that he promptly present himself before the Committee for the referred purpose, which

he then did. Each of the eleven charts were reviewed in detail with Dr. Ateser, and his full explanation was obtained respecting all points of concern. Dr. Ateser appeared to be most willing to cooperate, and the venture was undertaken in what Dr. Turner judged to be a spirit of total cooperation, without animosity on anyone's part (R. 77-79, 230, 252-253).

It was the conclusion of the Special Review Committee, and its recommendation to the Chief of Staff and Executive Committee, that Dr. Ateser should be placed on probationary status for six months, during which time his patient care should be closely supervised by the Surgical and Medical Department Committees, and that Dr. Ateser should attend all scheduled staff meetings. Before making these recommendations, each was fully discussed with Dr. Ateser and he indicated that they would be agreeable with him. On February 12, 1971, Dr. Turner made

a formal report on behalf of the Special Review Committee to Dr. Reebs respecting this matter (R. 77-79, 230, 252-253).

On February 19, 1971, the Executive Committee accepted the recommendation of the Credentials Committee and noted that Dr. Ateser had accepted the proposal of the Special Review Committee (R. 231, 253).

By letter of February 24, 1971, Dr. Reebs advised Dr. Ateser that the Special Review Committee had recommended to the Executive Committee that Dr. Ateser be placed on probationary status as an associate staff member for six months, during which time his work was to be reviewed by the Surgery Committee and the Medical Department Committee, and that, as an associate staff member, he was required to attend all scheduled meetings required by the Valley General Hospital By-Laws, Rules and Regulations, and to respond to questions concerning the treatment of patients

asked by either of the Committees. Dr. Ateser was further advised that records indicated that he was delinquent in the area of meeting attendance (R. 232, 253).

On June 7, 1971, the Hospital Administrator received an incident report from Nurse Fey regarding Dr. Ateser's inept handling of a delivery (R. 241-244). Recounting the same event shortly thereafter in a memo to the Credentials Committee, anesthesiologist Dr. A. L. Nordby concluded: "I would be reluctant to take the responsibility of giving an anesthetic under these conditions again." (R. 202)

In June of 1971, the Executive Committee designated Drs. Calta, Braile, and San Lwai, a foreign doctor born and educated in Burma and holding privileges at Valley General, to constitute a Special Review committee to go over Dr. Ateser's general medicine charts for the months of February

through May, 1971. The Special Review Committee met on June 10, 1971, and reviewed approximately fifty patient charts over the period in question. Although Dr. Ateser had been invited to attend the meeting, he did not appear. It was the unanimous conclusion of the members of the Special Review Committee that eleven of the charts reviewed presented examples of substandard medical practices by Dr. Ateser. Dr. Lwai testified that he bore no ill will towards Dr. Ateser and was in no way motivated by extraneous non-medical considerations (R. 102-103, 183, 253).

On June 10, 1971, the Special Review Committee recommended to the Executive Committee that it immediately require consultation and approval of therapeutic and diagnostic procedures on every medical patient admitted to Dr. Ateser's service. The Committee further noted that its

recommendation regarding consultation prior to invasive diagnostic procedures had not been carried out.

On June 11, 1971, the Executive Committee temporarily suspended Dr. Ateser's privileges in obstetrics. By letter of June 14, 1971, Dr. Ateser was notified of this suspension pending further investigation of obstetrical privileges, outlining procedure for providing care for his obstetrical patients, and enclosing a copy of the appeal and revocation section of the Medical Staff By-Laws (R. 254, 235).

Also, on June 14, 1971, the Department of Medicine received a notice from Dr. J. Michel reviewing another of Dr. Ateser's charts. It was found to be an unnecessary hospitalization in which Dr. Ateser not only used not indicated drugs, but drugs which may have been harmful to the patient (R. 188).

By letter dated June 18, 1971, Dr. Ateser's attorneys demanded an immediate reinstatement of the Ob-Gyn privileges and asked for appointment of a Special Review Committee (R. 237, 254). Also on that date, Dr. Robert Evoy submitted a report concerning the incident already reported by Nurse Fey (R. 189).

On June 21, 1971, the Credentials Committee received yet another complaint about the obstetrical management of one of Dr. Ateser's patients from Dr. Glen Patchen (R. 209-210, 239-240).

A special meeting of the Credentials Committee was held on June 21, 1971, to discuss with Dr. Nordby and five members of the Ob-Gyn Committee the case complained of by Nurse Fey, and also the overall obstetrical performance of Dr. Ateser. After written statements were submitted by Drs. Evoy, Patchen, and Nordby, a second special

meeting of the Credentials Committee was held on June 23, 1971. It was the unanimous opinion of the Credentials Committee that serious questions had been raised in regard to Dr. Ateser's experience, ability and judgment in Obstetrics. The Committee, therefore, recommended and concurred with a suspension of Dr. Ateser's obstetrical privileges. By letter dated June 23, 1971, Dr. William C. Kenner, Chairman of the Credentials Committee, notified the Executive Committee and copied Dr. Ateser, Dr. Reebs, Dr. Ateser's attorneys, and the Hospital Administrtor (R. 238, 254). Through his attorney and in a letter of June 29, 1971, Dr. Ateser protested the recommendation of the Credentials Committee and asked that a Review Committee be appointed as soon as possible (R. 245-246, 254).

On July 1, 1971, Dr. Reebs wrote Dr. Ateser asking for his suggestions for

appointment of members of the active Staff to the Review Committee (R. 247).

A Special Review Committee of Dr. Leo E. Haye, Rudolph Heilpern, and Richard H. Cole, reported to the Executive Committee on August 26, 1971. The Committee agreed that poor judgment had been used by Dr. Ateser in handling two specific cases and recommended that privileges be restricted to direct supervision of a physician on the active staff engaged in the practice of obstetrics (R. 248, 255).

On September 14, 1971, Dr. Ateser was notified by letter from the Executive Committee that he was to have consultations on all patients admitted to Valley General within twenty-four hours of admission. He was further notified of his right to appeal from that directive with notice of acts and omissions and case review documentation enclosed (R. 255, 249). A similar letter

was sent to Dr. Ateser on September 15, 1971, by Dr. Reebs, stating that if Dr. Ateser would have two physicians write to the Executive Committee that they will accept responsibility for supervising Dr. Ateser, the Executive Committee would be able to recommend that the Board of Commissioners restore his Ob-Gyn privileges on a restricted basis (R. 192).

On September 24, 1971, Dr. Ateser's attorney notified Valley General that Dr. Ateser wished to appeal the recommendation of restriction of obstetric privileges and asked that both the Obstetric and General Medicine recommendations be consolidated for hearing at the same time before the same Board of Review, and suggested that further action be suspended until Dr. Ateser could meet with the Special Review Committee (R. 193, 256). A similar letter was sent by Dr. Ateser's attorney to the Hospital Administrator (R. 194).

By letters dated February 23, 1972, and March 23, 1972, counsel for the Hospital responded to Dr. Ateser's request and set a time and place for the meeting (R. 195, 196, 256). A two-hour meeting took place between the Executive Committee and Dr. Ateser, with his counsel, on April 10, 1972. The recommendations as to both obstetrical and general medical privileges were discussed and Dr. Ateser and his counsel spoke to both issues (R. 256-257).

The Executive Committee met again on April 11, 1972, to review the meeting with Dr. Ateser and his attorney (R. 257). Also on April 11, 1972, Dr. Patchen, Chief of the Department of Obstetrics and Gynecology, wrote the Executive Committee to clarify the reasons for the department's recommending a suspension of Dr. Ateser's privileges (R. 211-226). By letter of April 14, 1972, Dr. Bardarson, the new

Chief of Staff, informed Dr. Ateser and his attorney that the Executive Committee was proceeding with the protocol to reduce his privileges and that they considered and rejected Dr. Ateser's request that physicians from outside the Hospital review Dr. Ateser's charts (R. 198, 257). Dr. Bardarson then wrote Dr. Ateser on April 14, 1972, and Dr. Ateser's attorney, informing him that his obstetrical privileges had been revoked (R. 199, 257). The Board of Commissioners were also notified on that date (R. 200, 257).

Pursuant to Dr. Ateser's earlier request, and in accord with the By-Laws, the Executive Committee then proceeded to establish a Judicial Review Committee, which was the next step in the reduction of Dr. Ateser's privileges. The Board of Commissioners was notified (R. 201, 258). It is important to bear in mind that prior

to the appointment of the Judicial Review Committee, a request had been made by the Ob-Gyn Committee to the Hospital's Credentials Committee that Dr. Ateser's obstetrical privileges be suspended, and that the Medicine Committee had recommended that Dr. Ateser's general medicine privileges be continued only on the condition that he obtain consultation by another member of the Medical Staff within twenty-four hours of admission of any patient.

The Judicial Review Committee met on July 18, 19, 20 and 25, 1972, at which times formal hearings were held totalling approximately twenty hours, or four full court days. All hearings were conducted in strict accordance with Hospital regulations and By-Laws. Dr. Ateser was present throughout the hearings, was represented by counsel, and was afforded the opportunity to testify and otherwise respond to the

charges and recommendations of the Departments of Obstetrics and Medicine of Valley General Hospital, and to introduce evidence or explanation as counsel felt appropriate. At the conslusion of the hearings, which were attended by a court reporter and have been transcribed, the Judicial Review Committee deliberated on the matter and recommended to the Executive Committee that it adopt the conclusions and recommendations of the Departments of Obstetrics and Medicine previously forwarded to it regarding Dr. Ateser's privileges, to wit: Dr. Ateser's obstetrical privileges be revoked and that his general medicine staff privileges be continued only on the specific condition that Dr. Ateser obtain consultation from another staff physician within twenty-four hours of admitting any patient to the Hospital (R. 96-98, 105-106).

A three page, typewritten memorandum report and recommendation was submitted to

the Medical Staff by the Judicial Review Committee. The Committee's recommendations should not escape the court's direct attention:

> The specific recommendations to the medical staff are unanimous.
>
> I
>
> The Committee finds that in the four obstetrics cases, there were errors in judgment and procedure that created unreasonable risks to the mothers and children involved, justifying the recommendation of the Obstetrics Committee that Dr. Ateser's privileges be revoked, and that recommendation is affirmed.
>
> II
>
> The Committee finds that in the eleven general medicine cases, there were excesses in invasive procedures, errors in diagnosis and treatment as to fully justify the recommendation of the General Medicine Committee requiring that Dr. Ateser's staff privileges be conditioned upon the requirement of consultation on any hospitalization of more than twenty-four hours; and that recommendation is affirmed.
>
> It is the opinion of the Judicial Review Committee that the foregoing constitutes a complete report and recommendation as required by the

> By-Laws; but the Committee feels that it would be remiss if it did not add the following observations and recommendations for consideration by the general staff:
>
> Based upon the evidence adduced at the hearings and the evidence alone, this Committee is gravely concerned, both for the career of Dr. Ateser and the welfare of all patients that he might have admitted here. It is apparent from the testimony, not only of hospital witnesses called in these proceedings, but from the testimony of Dr. Ateser himself, that there are serious problems of communication with other members of the staff, making and keeping patient records, the attitude of Dr. Ateser towards his patients, nurses and other physicians, all of which create the probability of grave future incidents.
>
> With a sincere concern for the best interests of Dr. Ateser, as well as all others concerned, it is a collateral recommendation of this Committee that the Medical Staff appoint a sub-committee to review Dr. Ateser's practice of medicine at the hospital, both as to past performance and on an on-going basis in the foreseeable future.

(R. 99-101, 258, 259)

By letter of August 21, 1972, counsel for Dr. Ateser requested a hearing before the Medical Staff in order to contest the

decision of the Judicial Review Committee dated August 16, 1972 (R. 219, 259).

Per the By-Laws and Dr. Ateser's request, this special meeting of the Medical Staff was set and noticed. The notice, which was circulated to the Medical Staff and copied to Dr. Ateser's attorneys and the Board of Commissioners, stated the time, place, purpose of the meeting, and the recommendations which Dr. Ateser wished to dispute (R. 220, 259).

The special meeting of the Medical Staff took place on September 12, 1972. Dr. Ateser and his counsel were present. Although counsel made a statement on Dr. Ateser's behalf, Dr. Ateser chose not to testify or to present any evidence. Thereafter, the recommendations of the Judicial Review Committee were discussed, and by a majority vote, the recommendations were approved. Dr. Ateser was advised that

evening of the outcome of the vote (R. 259). On September 13, 1972, the Board of Commissioners was advised of the Medical Staff's concurrence and recommendations of the Judicial Review Committee (R. 259). By letter dated September 22, 1972, counsel for Valley General advised Dr. Ateser, through his attorney, of the Board's receipt of recommendations from the Medical Staff, set forth the recommendations, and advised him of the opportunity to speak on his own behalf before the Board if it was notified within ten days (R. 169-171, 260).

On October 19, 1972, the Board of Commissioners, at its public meeting, concurred in and adopted the recommendations of the Medical Staff. The closing paragraph of the letter from counsel for the Hospital to Dr. Ateser's attorneys is particularly important in light of subsequent events:

> By virtue of the Board's action on October 19, the restrictions are presently of full force and effect, and must be complied with by Dr. Ateser, or he will face full revocation of privileges at Valley General Hospital.

(R. 174, 260; emphasis added.) These advices were conveyed to Dr. Ateser on October 20, 1972 (R. 150).

Shortly thereafter, Dr. Ateser flagrantly violated the conditions imposed upon the continuance of his general medicine privileges by failing to obtain the required consultations on admitted patients. On October 24, 1972, just four days after the communication of the Board's decision, a patient was admitted to the Hospital by Dr. Ateser without obtaining a consultation within twenty-four hours, or at any subsequent time (R. 261). On October 31, 1972, the Hospital's Chief of Staff, Dr. Baird Bardarson, wrote to Dr. Ateser complaining of Dr. Ateser's failure to

comply with the specific condition under which the continuation of his privileges hinged, soliciting his cooperation and warning again that strict adherence to the condition would be required (R. 175, 261). Dr. Bardarson stated in part:

> The Executive Committee is going to insist that you follow through with this regulation without fail If there are any questions about this, I would be most happy to clarify the matter with you.

Dr. Ateser took no heed. On November 13, 1972, a patient was again admitted to the Hospital by Dr. Ateser, but no consultation was obtained. Although the patient was in the Hospital for four days, and no consultation was obtained, Dr. Bardarson was patient one more time, but warned:

> I must remind you that your continuing to practice medicine at the Valley General Hospital is going to be contingent upon scrupulous adherence to the requirements imposed upon you by the Executive Committee and Governing Board. Please do not fail to obtain your required consultations in the future.

(R. 176, 261; emphasis added.)

Dr. Ateser's reaction to Dr. Bardarson's solicitations and admonitions was not long delayed. Seven days following the last referred letter, Dr. Ateser admitted a third general medicine patient to the Hospital, failing, and presumably refusing, to obtain the requisite consultation at any time, which final arrogance prompted Dr. Bardarson's letter to Dr. Ateser of November 30, 1972. By that letter, Dr. Ateser was notified that the Executive Committee had revoked his admitting privileges under the emergency provisions of the By-Laws, Rules and Regulations of the Medical Staff of Valley General Hospital, III, 5, (17). In his letter, Dr. Bardarson cites the three failures to obtain consultations, Dr. Ateser's verbal statements that he would not comply with the rules, Dr. Ateser's refusal to accept correspondence in regard

to Hospital matters, and his refusal to attend meetings of his assigned department, or the quarterly staff meetings that are required by the By-Laws. Dr. Bardarson declared an emergency. Citing the proper section in the By-Laws, he stated that the Executive Committee revoked Dr. Ateser's privileges (R. 177, 261). As with the two preceding letters, this final letter from Dr. Bardarson was copied to Dr. Ateser's attorney.

On that same day, Dr. Bardarson wrote to the Credentials Committee, advising them of the Executive Committee's action, and requesting an investigation and a report (R. 178, 262). The Administrator was also informed (R. 179, 262).

By letter of December 13, 1972, the Credentials Committee reported its investigation, meeting and recommendations to the Executive Committee. A meeting had been held.

> It was our unanimous opinion that the Executive Committee was absolutely right in revoking Dr. Ateser's admitting privileges. We feel he has flagrantly violated the rules set down for his hospital practice by the Judicial Review Committee and approved by the entire Medical Staff of Valley General Hospital. We do not, however, feel that this is a new matter which needs further review by any Committee of the Medical Staff, and that it is solely within the jurisdiction of the Executive Committee and the Board of Commissioners to remove Dr. Ateser from this hospital Medical Staff purely on the basis of his total disregard of the recommendations of the Judicial Review Committee and the Medical Staff.

(R. 180, 262) Rather than taking his case to the Board of Commissioners, Dr. Ateser filed a suit for injunctive relief in the Superior Court for the County of King of the State of Washington, King County Cause No. 760926. That suit was filed December 20, 1972 (R. 262).

At its public meeting of December 21, 1972, the Board of Commissioners, specifically referencing the three charts in

question, acted on the recommendation of the Executive Committee and revoked all staff privileges of Dr. Ateser. The basis for this action was "Dr. Ateser's refusal to abide by the Board's directive of October 19, 1972, that he obtain consultations on all hospitalizations within twenty-four hours of admission." Counsel for Valley General wrote Dr. Ateser's attorneys to this effect on December 26, 1972 (R. 181, 262).

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari states the issue as being whether the petitioner was afforded the minimum of procedural due process that is required by the United States Constitution. Both the United States District Court for the Western District of Washington and the United States Court of Appeals for the Ninth Circuit have addressed this issue and answered in the affirmative.

The petitioner here does not challenge the validity of the Hospital governing board's actions of October 19, 1972, which revoked his obstetric privileges and conditioned his continued general medicine admitting privileges upon his obtaining consultation from other staff physicians within 24 hours of his admitting a patient to the Hospital. This action was taken after almost two years of investigations, reviews, and hearings by the institution which involved formalities exceeding the requirements of due process. See Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 367, 368 (9th Cir. 1976).

Petitioner's claim is that procedural due process was violated by the Hospital invoking its emergency powers and failing to instigate a new set of hearings before reacting to three separate willful violations of the conditions and restrictions

imposed on the petitioner by the governing board's October 19, 1972, decision. The petitioner has admitted on the record that he knew of the restrictions placed upon his admission privileges and that he knew his actions were in violation of those restrictions (R. 155-156). Petitioner also claims his Fourteenth Amendment right to procedural due process was violated by the Hospital's failure to send a copy of the Credentials Committee's report to him, as is required by the Hospital By-Laws.

This court has rejected an inflexible concept of due process which would require a trial-type hearing in every conceivable case of government impairment of a private interest. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. Morrisey

v. Brewer, 408 U.S. 471, 481 (1972). The determination of whether due process requirements have been met in a particular case involves the consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1975).

Respondent grants that the private interest of the petitioner which was affected is one of significance. However, the petitioner's admissions regarding violations of the restrictions and conditions imposed on his privileges negates any risk that the procedures used erroneously deprived the petitioner of this interest.

Where all of the essential facts which it is the purpose of a due process hearing to establish have been admitted, use of alternative procedures is not inconsistent with due process. Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973).

The Ninth Circuit, in Stretten v. Wadsworth Veterans Hospital, supra at 368, analyzed the hospital's interest in maintaining a competent staff of physicians:

> The Hospital's interest is somewhat more complex. Like any government agency it has a strong interest in being able to deal quickly and inexpensively with personnel matters in order to promote efficiency and economy in administration. But because the government agency here is a hospital and plaintiff . . . is a professional, the employer's interest is more particularized than in the ordinary case. As a hospital the employer has a special interest in protecting its patients from treatment by one who is professionally incompetent. The survival of patients often depends upon the presence of competent physicians. The interest of the hospital in

enlarging the prospects of survival of patients weighs in favor of due process procedures which will minimize the risk of the continued employment of an incompetent doctor, so long as these procedures are consistent with notions of fundamental fairness. In a sense this is the reverse side of the Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1979), coin. In Goldberg the danger of lack of survival was borne by the plaintiff whose rights were terminated while here the risk is borne by the patients entrusted to the defendant's care.

The Hospital's interest is unusual in another respect. [Plaintiff] is a professional whose position requires that he work in close coordination with other medical personnel. A hospital staff is highly interdependent, both in the sense that one doctor depends upon the professional skill of other doctors and in the sense that the collegial nature of the body makes tolerable working relationships an absolute prerequisite to effective staff performance. The necessity for a healthy working relationship is a function of the nature of the work to be done. Incompatible workers on farms, ranches, or in certain types of factories can function reasonably well although even there it is doubtful that full efficiency is achieved. Effective performance by physicians on the staff of a hospital, whose tasks

> require a high degree of cooperation, concentration, creativity, and the constant exercise of professional judgment, requires a greater degree of compatibility. The Hospital must recognize this necessity. This enhances its interest in quickly dealing with incompetence and debilitating personal frictions.

Stretten, supra at 368. Other courts, including Supreme Court of Washington, have allowed hospitals broad discretion in determining the competency of physicians practicing on their staffs. Rao v. Board of County Commissioners, 80 Wn.2d 695, 497 P.2d 591 (1972). See also, Shaw v. Hospital Authority of Cobb County, 614 F.2d 946 (5th Cir. 1980); Sosa V. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971); Peterson v. Tuscon General Hosp., Inc., 114 Ariz. 66, 559 P.2d 186 (1976).

The restrictions placed on the petitioner's staff privileges were warranted by a history of reckless and arguably incompetent treatment of patients which had come

under his care at the Hospital. The Board of Governors took these steps primarily to protect patients who might come under his care in the future. His willful disregard of these restrictions, i.e., the failure on three separate occasions to obtain consultation from a staff physician within 24 hours of admitting a patient, left Chief of Staff Dr. Bardarson no choice but to invoke the emergency provisions of the By-Laws and revoke the petitioner's privileges.

The adequacy of the measures taken by the Hospital affecting the petitioner's rights turns, to a considerable extent, on the knowledge which the circumstances show the petitioner may be taken to have had regarding the consequences of his own conduct. Link v. Wabash R.R., 370 U.S. 626, 632 (1962). Chief of Staff Bardarson warned the petitioner in writing no less than three times between October 19 and

November 13, 1972, that a failure on his part to abide by the Board of Governors' October 19 edict would result in a full revocation of staff privileges. Three separate violations occurred subsequent to October 19, 1972, despite those warnings.

Taken together, the Hospital's overriding interest in insuring that petitioner's incompetence would not endanger its patients and the fact that petitioner has admitted the facts which would have been at issue at a hearing make the actions taken by the hospital in revoking petitioner's staff privileges consistent with due process.

Petitioner's claim that procedural due process was violated by the Credentials Committee's failure to send him a copy of its report was properly rejected by both courts below. Although it is true that Hospital By-Laws do require such a report

to be sent, petitioner's failure to receive this report in no way prejudiced his due process rights. Where due process has been amply provided, as was the case here, the failure to abide by internal procedures does not negate the validity of the Hospital's actions. Kaplan v. Carney, 404 F. Supp. 161, 165 (E.D. Mo. 1975).

For all of the foregoing reasons, respondent respectfully requests this court to deny the writ for certiorari.

Respectfully submitted,

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